

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



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74-2559

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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RAYMOND MILLS,

Plaintiff-Appellant,

-and-

HARRY F. SIMMONS,

Plaintiff,

74-2559

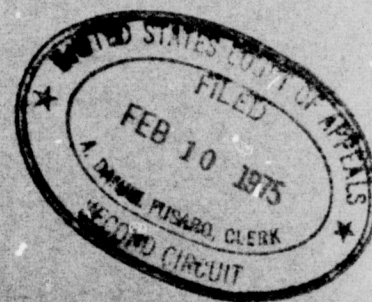
-against-

THE LONG ISLAND RAILROAD COMPANY,  
HAROLD J. PRYOR, THOMAS J. BUTLER,  
WALTER DAY, MERRILL J. PIERCE,  
MARTIN BURKE, JAMES MOON and SAL  
BARBUTO, constituting a majority of  
the Officers of the United  
Transportation Union (T),

Defendants-Appellees.

----- x

BRIEF OF PLAINTIFF-APPELLANT



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BRIEF OF PLAINTIFF-APPELLANT

Statement of Case

Plaintiff Raymond Mills, a trainman employed  
by defendant The Long Island Railroad Company (herein-  
after referred to as "The Long Island") and a member and  
officer of the United Transportation Union (hereinafter  
referred to as "Union"), appeals to this Court from so  
much of the judgment entered in this action on November

1, 1974 as directs summary judgment dismissing plaintiff's complaint upon the order of the Honorable Orrin Judd of the United States District Court, for the Eastern District of New York (128a, 127a, 116a-126a).\*

This controversy concerns the validity of letter agreements authorized solely by defendant, Harold J. Pryor as General Chairman of the Union which agreements modify the collective bargaining agreement of the Union and the Long Island with respect to the disciplinary procedures imposed upon employees for run failure, i.e., failure to give at least three hours notice of intended absence from duty (28a-30a). Pursuant to these letter agreements, trainmen such as plaintiff Mills are now subject to suspension for the third and fourth run failures and for dismissal for the fifth run failure without benefit of a fair and impartial hearing in contravention of the express provisions of the formal collective bargaining agreement (28a-31a).

Plaintiff Mills, who received a fifteen (15) day suspension for a third run failure and a thirty (30) day suspension for a fourth run failure, pursuant to the provisions of the letter agreements, commenced an action for a permanent injunction in the Supreme Court of the State of New York, Suffolk County, by service of a summons and complaint and order to show cause for a preliminary injunction (35-38a, 8-18a, 19a-21a). A stay was also

\*Plaintiff Harry F. Simmons is not a party to this appeal.

issued against any disciplinary action presently pending against the plaintiff (20a). Long Island cross-moved for a dismissal of the complaint. Prior to the State Court's hearing of either of these motions, Long Island filed a petition for removal to the United States District Court where all motions were renewed and argued upon plaintiff's motion to remand to the State Court (3a-4a).

Notwithstanding the stay issued by the State Court plaintiff Mills was finally dismissed for a fifth run failure following the issuance of the stay aforementioned (88a-89a). Hence, he also sought punishment of defendants for contempt (125a-126a); however, this motion was also denied.

Briefly, plaintiff contends that the letter agreements are invalid because they violate railroad employees' constitutional rights of due process under the Constitutions of New York State and the United States, which the Long Island as a corporation owned by the Metropolitan Transportation Authority an agency of the State of New York is obligated to uphold and because these agreements were made by the Chairman without approval by the General Committee of Adjustment or the members of the Union.

The Court dismissed plaintiff's complaint as premature for failure to have exhausted internal union remedies (25a). In order to reach this conclusion, however, the

Court ignored proof that plaintiff Mills had indeed taken an appeal to the American Arbitration Association in accordance with the provisions of the new letter agreements with respect to the discipline imposed upon him for his alleged run failures, and that said appeal is presently pending.

The Court further ignored plaintiff's complaint of a violation of his constitutional rights which is a claim which may be the subject of Court action without exhaustion of internal union remedies according to law.

Indeed, proof was submitted to the Court that even the defendant union recognizes that Article 28 of its Constitution which requires its members to initially exhaust all union remedies for correction of grievances does not apply to a complaint concerning the violation of a member's Constitutional rights (91a, 93a).

We submit that the decision of Mr. Justice Orrin Judd granting summary judgment to defendants is erroneous and contrary to law requiring reversal by this Court and reinstatement of plaintiff's action.

### Statement of Facts

#### Denial of Due Process

The Long Island Railroad, a wholly owned subsidiary corporation of the Metropolitan Transportation Authority, a public benefit corporation of the State of New York, entered into a collective bargaining agreement on February 17, 1972 with the United Transportation Union, the bargaining unit of the Long Island Railroad employees, which agreement was then ratified by a majority of the Union's members. Article 42 of said agreement concerning disciplinary procedures in part provides:

- (a) "Employees shall not be suspended or dismissed, without a fair and impartial trial."

Pursuant to the procedure outlined, an employee may be represented at the trial and both he and the General Chairman of the Union shall be supplied with copies of the trial record. Article 42 further provides that the decision of the Superintendent may be appealed for a hearing before an impartial arbitrator appointed by the American Arbitration Association and if an employee is exonerated after having been held out of service, he is to be reinstated with his seniority unimpaired and he is to be compensated for the earnings he would have received.

On June 4, 1973 a new agreement concerning the discipline to be imposed for run failures was made in the form of a letter signed by the President of the Long Island and the Chairman of the Union which permits an employee to be

suspended and dismissed for run failures without benefit of a fair and impartial trial. Specifically, the letter agreement of June 4, 1973 states:

"It is agreed that such discipline will be assessed on the following schedule:

1. First run failure, 'talk session' with the appropriate Assistant Superintendent or his representative,
2. Second run failure, record assessed with a 'reprimand'.
3. Third run failure, an actual fifteen (15) days' suspension.
4. Fourth run failure, an actual thirty (30) days' suspension.

(It is understood that repeated run failures can result in the successive imposition of the discipline specified in either steps 1, 2, 3, or 4, subject only to the restrictions of the twelve-month period referred to herein below.)

5. Five (5) run failures within any twelve-month period will result in the employee's dismissal.

No formal investigation (or trial) will be held on any of the aforesaid five (5) steps. However, if the employee desires, he may appeal the discipline imposed in steps 3, 4, and 5 in accordance with the provisions of Article 42(k) of the Working Agreement provided he notifies the Superintendent-Personnel Management within ten (10) days of the date the assessed discipline becomes effective."

The provisions of the letter agreement of June 4, 1973 was subsequently amended on December 14, 1973 by another letter agreement between Mr. Pryor and the President of the railroad which provides:

"It was agreed that before the involved employee can be permanently discharged, as provided in Step 5, he may be accorded a formal hearing, if he desires, and so notifies the Superintendent within ten (10) days of the date he is notified of the discipline.

This provision will apply likewise to the two cases presently being progressed to the American Arbitration Association; namely, J. T. Cannon, Case RF 341-73 and B. Jones, Case RF 375-73.

It is further understood that, except for the modification listed herein above, the June 4, 1973 Agreement remains in full force and effect."

Prior to changes authorized by these letter agreements, trials were permitted even on the first and second offenses, according to the Assistant Superintendent of Transportation for the Long Island Railroad, Lawrence W. Dixon (99a).

Under the new procedures, aggrieved employees are completely denied any trial or hearing with the employer, except in the case of dismissal (99a).

The severity and harassment of the new disciplinary procedure for run failures was underscored by the testimony of Mr. Dixon who stated that a trainman is subjected to penalty for any failure to report to work even though he may be sick, if said employee fails to notify the company at least three (3) hours prior to his expected arrival times (106a).

Since most trainmen must report to duty between the hours of 5 and 6 A.M. in the morning, notice of absence must be given by 3 A.M. that morning (102a).

When Mr. Mills was notified of his suspension for run failures three and four, he sought a hearing and was advised that his request would be considered as his notice of appeal to the American Arbitration Association (39a,40a).

Thus, plaintiff Raymond Mills in accordance with the new discipline procedures outlined in the letter agreements aforementioned has appealed his own suspensions to the American Arbitration Association. The proceedings before said body have been held in abeyance pending the determination of this case. Said proceedings do not, however, speak to the issues raised herein, i.e., the validity of the letter agreements and the deprivation of due process precipitated by the procedures authorized pursuant to these agreements.

The Unauthorized Actions  
of General Chairman

The Constitution of the United Transportation Union authorizes the General Committee of Adjustment "to make and interpret agreements with representatives of transportation companies covering rates of pay, rules or working conditions..."

Article 87 of the Constitution provides that the Chairman of the General Committee of Adjustment shall be its executive head with authority to act in place of the General Committee of Adjustment between sessions of the Committee.

Article 75 specifies that an officer or member of a local may appeal the action of the General Chairman to the General Committee of Adjustment and may further appeal the decision of the General Committee of Adjustment to a Board

of Appeals within ninety (90) days of the action.

At a hearing before the Hon. Orrin Judd, Raymond Mills testified that he was a member of the General Committee in 1972 and 1973 (26). He further testified that the General Committee met regularly prior to June 4, 1973 and after June 4, 1973 and before December 14, 1973 and after December 14, 1973. He unequivocally stated that at no time was the subject of these letter agreements ever discussed before the General Committee although the Committee was clearly in session throughout these periods (24a).

The Court is respectfully requested to note that although the General Chairman of the Union, Harold J. Pryor, submitted affidavits to the Court below wherein he asserts his authority under the Union's Constitution to enter into these letter agreements on behalf of the Union, he at no time claims that the General Committee of Adjustment was not in session at the time these letter agreements were signed (79a-83a).

Another significant point to note is Mr. Pryor's failure to assert that these agreements were ever presented to or discussed by the General Committee of Adjustment of the Union or submitted to the Union membership for approval (79a-83a).

Mr. Mills did not become aware of the letter agreements and the subjects covered therein until some time after they went into effect. Indeed, he first became aware of

them at a time when it was too late to do anything about them internally within the Union (114a). He did, however, voice his opposition to these agreements to the members of the Board (29). He also testified that in 1973 he filed an appeal with respect to the actions of the General Chairman in another matter and found that the appellate procedures outlined in the Union's Constitution proved to be wholly unsatisfactory, indicating the futility of his efforts in appealing such a decision within the Union (111a-112a).

#### Contempt

On May 20, 1974 the State Court enjoined the defendant railroad from proceeding with any disciplinary action pending against plaintiff based upon a violation of the letter agreements. As previously indicated herein, plaintiff Raymond Mills was subject to fifteen (15) and thirty (30) day suspensions for his third and fourth run failures (17a-21a).

On May 31, 1974 plaintiff Mills was relieved from his duty for a fifth run failure and advised in a letter dated Monday, June 3, 1974, that he was dismissed from the employ of the defendant railroad.

In the Court below plaintiff sought an order punishing the defendant for contempt of the State Court stay contending that the third and fourth run failures were stayed as of June 1, 1974 precluding the defendant railroad from using them as a basis for dismissing plaintiff Mills for a fifth run failure on June 1, 1974.

While plaintiff Mills was on the witness stand in the Court below, his attorney attempted to elicit information from him concerning this dismissal in order to support his application for an order punishing defendant for contempt but was precluded from doing so by the Trial Justice who indicated that this matter was a question of law to be decided by the Court (114a).

Significantly, in his Order of October 30, 1974 Mr. Justice Judd refused to determine plaintiff's application for contempt on the grounds that plaintiff informally brought this issue before the Court in an unsworn memorandum of law. Yet, when plaintiff attempted to elicit sworn testimony on this issue at the hearing, the Court refused to allow same as outlined above (126a).

While the Court in effect refused to make a determination on this issue, the Court did comment that there certainly was a serious question whether the Long Island Railroad should have considered the third and fourth run failures as established in view of the pending arbitration proceedings and the order to show cause. Additionally, under the letter agreements discipline for run failures are cumulative so that defendant could not have dismissed plaintiff for a fifth run failure if it had not already suspended him for his third and fourth run failure. Thus, plaintiff contends herein, as he did in the Court below, that defendants violated the State Court stay by proceeding

with disciplinary action presently pending against him, entitling him to an Order punishing the defendant Railroad for contempt.

#### Questions Presented

1. Whether action by defendant The Long Island Railroad Co., a wholly owned subsidiary corporation of a New York State Agency, the Metropolitan Transportation Authority, constitutes State Action subject to constitutional limitations?

2. Whether plaintiff is required to exhaust internal union remedies prior to seeking judicial relief for violation of his constitutional rights to due process?

3. Whether the plaintiff is entitled to an order adjudging defendants guilty of contempt for its dismissal of plaintiff in violation of a Supreme Court of the State of New York order which stayed further disciplinary action against plaintiff?

POINT I

SINCE THE PRESENT ACTION IS BASED UPON A VIOLATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS, THE COURT BELOW ERRED IN FINDING THAT SAME WAS PREMATURELY INSTITUTED AND IMPROPERLY SUBJECTED PLAINTIFF TO THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES UNDER THE RAILWAY LABOR ACT

A review of the opinion of Mr. Justice Judd discloses that he miscomprehended the law applicable to the situation presented herein, misconstrued many of the proven salient facts and totally ignored others, and refused evidence offered on behalf of plaintiff and then penalized him for his failure to establish the precluded matters, all of which erroneously resulted in summary judgment for defendants (117a-126a). The decision of the lower Court is contrary to the facts and the law mandating a reversal on this appeal.

The main issue involved in the present case is the violation of the constitutional rights of the plaintiff by the defendant Long Island Railroad Company, an agency of the State of New York, as well as the defendant United Transportation Union.

The decision of the Court below, however, wholly fails to speak to this issue for reasons which are detailed below.

I

Although plaintiff cited authority to support its contention that defendant, The Long Island Railroad Company, is an agency of the State of New York as a wholly owned subsidiary corporation of the Metropolitan Transportation Authority which was created pursuant to §1266 of the Public Authorities Law of New York, and thus, subject to the same constitutional limitations of any other public agency, the Court below refused to make any such finding concluding that same was unnecessary in view of its prior finding that plaintiff must first exhaust his internal union remedies pursuant to the authority of the Railway Labor Act.

The Court's refusal to consider this issue constitutes a highly prejudicial error in that such a finding is critical to plaintiff's claim of violation of his constitutional rights.

This Court is respectfully referred to §1266 of the Public Authorities Law and the case of The Long Island Railroad vs. The Public Service Commission, 30 A.D.2d 409, 292 N.Y.S.2d 167 (2d Dep't 1968) wherein the Long Island Railroad as a wholly owned subsidiary corporation of the Metropolitan Transportation Authority may be considered an agency of the State of New York sworn to uphold the constitutions of both the United States and New York State with respect to due process requirements.

Significantly, Mr. Justice Constantino of the United States District Court, Eastern District of New York, recently held that action by the Long Island Railroad Co. is "State Action" finding that it thus had the burden of establishing the necessity of a grooming regulation which imposed a restriction on its employee's constitutional rights.

Ammerati, et al. vs. Metropolitan Transportation Authority, et al., Index No. 73 C 1888.

Furthermore, the Trial Justice initially erred in finding that the National Railroad Adjustment Board had exclusive jurisdiction over an employee's grievance of the kind presented in the instant action (123a-124a).

In Glover v. St. Louis-S.F.R. Co., 393 U.S. 324 (1968) and in Vaca v. Snipes, 386 U.S. 171 (1967), the United States Supreme Court held that the jurisdiction of the National Railroad Adjustment Board is limited only to disputes between an employee or a group of employees and a carrier or carriers. The instant action presents a suit by an employee against both the carrier and the union.

Furthermore, the jurisdiction of the National Railroad Adjustment Board is to interpret the meaning of the collective bargaining agreement. The case at bar, however, presents a challenge to the validity of the agreements themselves. Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952).

Plaintiff challenges the validity of the letter agreements in that he asserts that the General Chairman was not

empowered to bind the union to such agreements under its Constitution. The General Chairman is only authorized to act for the General Committee when the Committee is not in session. Significantly, defendant Pryor wholly failed to assert that the General Committee was not in session at the times when he entered into these agreements (79a-83a).

We further submit that the amendments authorized by these letter agreements to the collective bargaining agreement were of such a substantial nature that a ratification of union membership was also necessary under said Constitution as the original collective bargaining agreement was so ratified (74a).

Thus, the Court below also erred in finding that the National Railroad Adjustment Board had exclusive jurisdiction over an employee's grievance of the kind presented in the instant action.

The Court further erred by refusing to consider whether the Long Island Railroad Co. is a State agency subject to constitutional limitations. Both of these errors precipitated the Court's improper finding of prematurity based on the doctrine of exhaustion of remedies.

## II

The Court found that plaintiff's suit was premature because of his failure to exhaust internal union remedies prior to seeking judicial relief. In order to make this determination, the Court ignored plaintiff's complaint which charges defendants with violating his constitutional rights to due process, a claim which may be the subject of suit without prior exhaustion of other remedies. Indeed, even the international office of the defendant union admits that Article 28 of its Constitution which concerns the prior exhaustion of union remedies does not apply to a suit concerning an alleged violation of constitutional rights (91a).

In other words, the opinion rendered by the Court below granting summary judgment to defendants on the grounds that plaintiff's complaint was premature in that he has failed to exhaust his internal union remedies is erroneous because it assumes that the disciplinary system set forth in the letter agreements including remedies for aggrieved employees satisfies the requirement of due process.

Briefly, plaintiff's complaint asserts that defendants have violated his constitutional rights to a fair and impartial hearing by suspending him for alleged run failures without an opportunity to be heard.

The concept of due process is not static but expanding, as witnessed by the United States Supreme Court's holding in Fuentes v. Shevin, 407 U.S. 67 (1972) striking down the prejudgment replevin laws of Florida and Pennsylvania as violative of the due process clause of the 14th Amendment since no hearing was afforded to the possessor prior to the seizures of goods.

Mr. Justice Stewart's opinion states:

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. If the right to notice and hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.

At a later hearing an individual's possessions can be returned to him if it was unfairly and mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation but no later hearing and no later damage awarded can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone. Stanley v. Illinois, 405 U.S. 645, 647; 92 S. Ct. 1208, 1210".  
(Fuentes v. Shevin, supra, 407 U.S. at 80-82).

The Fuentes opinion settled a long standing debate whether the right to a prior hearing would be limited to special property or necessities. The 14th Amendment protection of property has been broadly read to extend protection to any significant property interest.

Indeed, in Bell v. Berson, 402 U.S. 535 (1970) the Supreme Court of the United States held that there must be an opportunity for fair hearing before a mere suspension of a driver's license.

Clearly then, the loss of employment, salary and seniority would constitute the deprivation of an interest encompassed by the 14th Amendment's protection.

In the Fuentes case, supra, the Court admitted that a person need not be given an opportunity to be heard before he is deprived of his property under very special, extraordinary but severely curtailed, circumstances such as where the seizure is directly necessary to secure an important governmental or general public interest objective. See also Arnett v. Kennedy, U.S. , 94 S. Ct. 1633 (1974) Sanford v. Rockefeller, 70 Misc.2d 833, 335 N.Y.S.2d 502, modified 337 N.Y.S.2d 688, 40 A.D.2d 82, aff'd. 32 N.Y.2d 788, 345 N.Y.S.2d 543, vacated 94 S. Ct. 2377 (1974).

The fact that plaintiff has a remedy, i.e., appeal to the American Arbitration Association is not controlling, where, as here, he is challenging the validity of the letter agreements, the constitutionality of the General Chairman's actions in agreeing to these new disciplinary procedures without obtaining the approval of the General Committee of Adjustment or members of the union, and where he is claiming that the enforcement of these new procedures constitutes a violation of his constitutional rights.

In addition, the appeals prosecuted by plaintiff to the American Arbitration Association will concern only the issue as to whether plaintiff did or did not commit run failures. These proceedings cannot by their very nature review the validity of the letter agreements or the issue of whether plaintiff's constitutional rights have been violated by the enforcement of these agreements.

Thus, it would be futile for plaintiff to wait until completion of these proceedings, for even if he is successful, these proceedings cannot determine the questions presented herein and will further prolong a continuation of the deprivation of plaintiff's rights.

The Court below was obliged to follow the law of the State of New York with respect to the necessity of exhausting administrative remedies prior to seeking judicial relief. It is obvious by its memorandum that it has failed to comply with this requirement for the law of the State does not require the exhaustion of administrative remedies where a situation is presented claiming violation of one's constitutional rights. See Halpern v. Lomenzo, 35 A.D.2d 41, 312 N.Y.S.2d 756 (3d Dep't 1970); Imperial Realty Co., Inc. v. City Rent Agency, 71 Misc.2d 688, 337 N.Y.S.2d 132, 71 Misc.2d 688 (S. Ct. 1972); Application of Kenning, 72 Misc.2d 929, 339 N.Y.S.2d 793, aff'd. 43 A.D.2d 815, 350 N.Y.S.2d 1017 (4th Dep't 1972).

Under the foregoing cases and others which are too numerous to set forth, the doctrine of exhaustion of administrative remedies, although a device by which the Courts deny premature or unnecessary resort to their jurisdiction, is not without limitation. If an administrative remedy would afford a plaintiff substantially less than adequate relief for a wrong or no relief at all, the failure to exhaust remedies should not be a bar to seek relief in the Courts through any appropriate means.

It is obvious that the instant situation is unique and that the exhaustion of remedies provided in the new letter agreements could only at best serve to reinstate plaintiff upon a finding that he did not commit five run failures. The questions presented by plaintiff in the instant action do not merely raise a question as to the interpretation of these agreements, but challenges their very legitimacy and asserts that their enforcement denies plaintiff's rights guaranteed to him under the Constitutions both of the United States and the State of New York.

In Glover v. St. Louis-S.F.R. Co., 393 U.S. 324 (1968) the United States Supreme Court made clear that the exhaustion requirement is subject to a number of exceptions for the authority of situations in which strict application of the exhaustion rule would defeat the overall purposes of federal labor relations policy, citing Vaca v. Sipes, 386 U.S. 171 (1967).

In Vaca, supra, the Court stated:

"It is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. 650. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 386 U.S., at 184-185.

Thus, not only because of the constitutional nature of the instant action, but due to the fact that the defendants entered into the letter agreements without authority, the defense of exhaustion of internal remedies does not apply herein.

Hence, the Trial Justice's recognition of this defense, granting defendants' motion for summary judgment, was improper, requiring reinstatement of plaintiff's action.

POINT II

SINCE THE DEFENDANTS HEREIN VIOLATED AN  
EXISTING STAY ISSUED BY THE STATE COURT,  
THE COURT BELOW ERRED BY REFUSING TO  
ADJUDGE SAID DEFENDANT IN CONTEMPT

Upon plaintiff's application, the State Court  
signed an order to show cause for a preliminary injunction  
on May 20, 1974 which included the following stay:

"ORDEPED, that pending a hearing on this  
motion the defendants hereby be and hereby  
are enjoined and restrained from proceed-  
ing with any disciplinary action presently  
pending against the plaintiffs as a result  
of alleged violations of the aforementioned  
letter agreements of June 4th, 1973 and  
December 14th, 1973, and it is further  
. . .".

On June 21, 1974 in accordance with the disciplin-  
ary procedures included in the letter agreement, plaintiff  
Mills was dismissed because of his alleged fifth run  
failure (88a-89a).

Plaintiff Mills requested that defendants be  
adjudged in contempt for their clear and certain violation  
of the State Court's order staying any further disciplinary  
action (87a). Defendants responded by claiming that the  
stay related only to the suspensions imposed upon trainman  
Mills for his third and fourth run failures contending  
that the dismissal of plaintiff for his fifth run failure

was a subsequent and distinct disciplinary action which was not pending against plaintiff at the time of the Court's issuance of a stay.

We submit that appellees' 'ingenious' arguments ignore the cumulative nature of the disciplinary procedures imposed for run failures outlined in the letter agreements. As the Court below correctly observed, plaintiff Mills could not have been automatically dismissed for a fifth run failure, if at the time of the State Court's issuance of a stay, plaintiff had not allegedly committed four prior offenses.

It is significant that the Court below questioned the propriety of railroad's treatment of plaintiff's third and fourth run failures as established in light of the pending arbitration proceedings, and the State Court's order to show cause. Since run failure 3 and 4 were stayed as of June 1, 1974, defendant Railroad could not use them as a basis for dismissal for plaintiff's fifth run failure. The defendant Railroad, nevertheless, advised plaintiff on June 3, 1974 that he was dismissed from the Long Island's employ (88a-89a).

The Court below refused to make any finding of contempt asserting that the facts in support of such a finding appeared only in unsworn memorandum of law (126a). We contend herein that the Court committed a highly prejudicial error by so holding because plaintiff Mills submitted his own sworn affidavit to the Court wherein he specifically states the facts which support such a finding

(84a-87a). Defendants' sole response to these facts were made in an unsworn memorandum of law and most importantly, the Court below refused to permit plaintiff to introduce any proof relating to this issue at the hearing indicating that such proof was unnecessary since this issue presented a question of law solely for the Court (114a).

The stay issued on May 20, 1974 was in effect at the time of plaintiff's dismissal. The lower Court had the power to adjudge the defendants in contempt for violating the stay. System Federation No. 91 Ry. Emp. Dept. American Federation of Labor v. Reed, 180 F.2d 991 (1950). Its refusal to even consider plaintiff's motion to punish defendants for same was highly prejudicial and clearly erroneous.

While the Court in effect refused to make a determination on this issue, the Court did comment that there certainly was a serious question whether the Long Island Railroad should have considered the third and fourth run failures as established in view of the pending arbitration proceeding and the order to show cause. Thus, plaintiff contends herein, as it did in the Court below, that defendants violated the State Court's stay by proceeding with disciplinary action presently pending against plaintiff for his fifth run failure.

CONCLUSION

The order of the Court below should  
be reversed in all respects.

Respectfully submitted,

JOSEPH P. NAPOLI  
Attorney for Appellant



AFFIDAVIT OF SERVICE

STATE OF NEW YORK)  
COUNTY OF NEW YORK)

SS.:

REGINA WEINKOFF, being duly sworn, deposes and says that deponent is associated with the attorney for the plaintiff herein.

That on the 7 day of February, 1975 deponent served the within Brief of Plaintiff-Appellant

upon the attorneys for the defendants by depositing <sup>three</sup> ~~one~~ true copies of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at #100 Church Street, in the City, County and State of New York directed to said attorneys as follows:

George M. Onken, Esq.  
Jamaica Station, Jamaica, New York  
Attorney for Appellee, Long Island Railroad Co.

Thomas J. Higgins, Esq.  
200 So. Service Road, Roslyn Heights, New York  
Attorney for Appellee, United Transportation Union

those being the respective addresses within the State designated by them for that purpose upon the preceeding papers in this action, or the respective places where they then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 18 years.

Sworn to before me this

Regina Weinkoff  
Regina Weinkoff

7th day of February, 1975

Margaret Myers  
MARGARET MYERS  
COMMISSIONER OF DEEDS  
CITY OF N. Y. 2-2371  
Cert. filed in N. Y. County  
Commission Expires June 1, 1975